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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 MINERVA TEXTILES, LTD.,

4 Plaintiff,

5 v.

13 CV 8954 (VSB)

6 ABC SUPERSTORES, INC., et al,

7 Defendants.

8 -----x
9 New York, N.Y.
November 24, 2015
11:30 a.m.

10 Before:

11 HON. VERNON S. BRODERICK,

12 District Judge

13 APPEARANCES

14 BALLON, STOLL, BADER and NADLER
15 Attorneys for Plaintiff
16 BRETT ANDREW NADLER, ESQ.

17 MYERS TERSIGNI FELDMAN & GRAY LLP
18 Attorneys for Defendant ABC
ANDREA TERSIGNI, ESQ.

19 CALLAN, KOSTER, BRADY & BRENNAN
20 Attorneys for Defendant Gilbar
STEPHEN BARRETT, ESQ.

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(Case called)

(In open court; via speakerphone)

THE COURT: This is Judge Broderick. Who is on the line? Why don't we first go -- I'll hear from plaintiffs.

MR. NADLER: Brett Nadler for plaintiff.

THE COURT: For the defendants?

MS. TERSIGNI: Good morning, your Honor. This is Andrea Tersigni for ABC defendants.

MR. BARRETT: This is Stephen Barrett for Gilbar Trading and Seymour Dayan.

THE COURT: I'm in my courtroom. We have a court reporter here and my law clerk is here also. So let me first review for the parties the documents I have in connection with today's conference. I have the November 5th letter from plaintiffs, plaintiff's letter from November 5 requesting a conference. I have the response of the ABC defendants on November 6 and I have the November 10 letter from the ABC defendants responding to my questions and providing income statements as well as copy of the expert report of -- and I apologize, how do you pronounce the expert's name?

MS. TERSIGNI: Loketch.

THE COURT: From Mr. Loketch. So let me ask, first I'll ask Mr. Nadler. As I understand it, Mr. Loketch has been proffered as an expert, an expert report has been produced. Mr. Loketch is the accountant, as I understand it, for the ABC

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1 defendants and in connection with that work he prepared various
2 income statements which were prepared and actually produced a
3 while ago. My understanding is defendant, the ABC defendants
4 have retained Mr. Loketch as an expert and that he's prepared
5 an expert report with regard to -- and this is just my, I have
6 not read the report cover to cover, but my cursory review would
7 be the specific profits or revenue, for lack of a better term
8 related to jeggings during the relevant time period.

9 My understanding, though, is that the income
10 statements also, that there's backups which I think amount to
11 invoices, bills and the like that was utilized in some way to
12 create the income statements and possibly utilized in
13 connection with preparation of the expert report and that those
14 documents number some 40,000 pages or so.

15 First let me ask, do I have all the submissions of the
16 parties? First, Mr. Nadler?

17 MR. NADLER: With regard to the letters that you
18 referred to?

19 THE COURT: That's correct, Mr. Nadler.

20 MR. NADLER: Is that what you're asking, those are all
21 the submissions?

22 THE COURT: Correct.

23 MR. NADLER: Those are the three, I guess submissions,
24 yes, that were recently, of recent origin, I guess.

25 THE COURT: And Ms. Tersigni?

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1 MS. TERSIGNI: Yes, I believe your Honor has
2 identified all of the applicable correspondence to the Court.

3 THE COURT: Mr. Barrett, I think you're just an
4 observer in this. I haven't received anything from you.

5 MR. BARRETT: That's correct, your Honor.

6 THE COURT: Okay. So let me ask, as I understood it
7 from the letters, am I correct the expert deposition has not
8 occurred, the documents, the 40,000 pages of documents have not
9 been reviewed by plaintiff or otherwise produced? Is that an
10 accurate statement of where things currently stand?

11 MR. NADLER: That's correct, your Honor.

12 THE COURT: All right. So, as I understand, expert
13 discovery actually was scheduled to close on November 10. So
14 let me hear from the parties and then I've got a possible
15 suggestion for the parties going forward. First, Mr. Nadler.

16 MR. NADLER: Well, your Honor, I think that one of the
17 preliminary issues is not so much whether it's expert
18 disclosure or expert -- whether these documents were underlying
19 the expert report, but more they were requested during
20 discovery and not produced and it was only after service of
21 this expert report and disclosure of this expert that the
22 existence of these documents were even disclosed, these 40,000
23 pages. My understanding of the relevant rules is that the
24 documents certainly should have been turned over at an earlier
25 time in response to document requests that were served. I

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1 specifically asked for these documents and, furthermore, they
2 were not objected to. So as an initial issue, that's what is
3 of primary concern, that plaintiffs have a failure to disclose
4 these documents as well as Mr. Loketch, while being disclosed
5 as an expert now, and it turns out he prepared the income
6 statements that were turned over during discovery. So
7 certainly it would appear that the ABC defendants had knowledge
8 of Mr. Loketch not as an expert but as a fact witness of sorts
9 or as someone who has relevant information as to the documents
10 that were turned over and could have been deposed during fact
11 discovery had his name been disclosed but wasn't.

12 It just seems that now that we're coming up on the eve
13 of trial all of a sudden there's 40,000 pages being disclosed,
14 names of witnesses who the ABC defendants appear to have known
15 or had actual knowledge of their relevant knowledge to this
16 case and yet were not disclosed.

17 THE COURT: Okay. Let me hear from the ABC defendants
18 counsel, Ms. Tersigni.

19 MS. TERSIGNI: Yes, your Honor. Thank you. I'd like
20 to respond to plaintiff's position and also, if I'm permitted,
21 to make a proposal that I think might be viewed as positive not
22 only for the parties but for the Court as well.

23 With respect to the timeliness of the disclosure of
24 Mr. Loketch and the underlying documents, as your Honor
25 indicated, the income statements that are now attached to

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1 Mr. Loketch's report as attachment 1 was produced to plaintiffs
2 in the summer of 2014. The idea that the existence of the
3 underlying documents was allegedly not known and so the time
4 when those same income statements were produced with the report
5 is questionable because obviously the income statements are a
6 summary based on underlying documents and Mr. Nadler never
7 raised an issue regarding the underlying documents. There's a
8 reason there was no objection regarding the underlying
9 documents, it's because ABC does not object to producing the
10 documents by way of making them available for inspection and
11 copying. Further, it was very clear pursuant to the agreement
12 by way of discussions that the parties had at the inception of
13 the case that expert discovery, which typically will include
14 expert discovery regarding damages, would be left until after
15 any decision on dispositive motions to save time and expense in
16 the event it would be shown to not be necessary if the case was
17 summarily dismissed. This was further supported by the fact
18 that indeed plaintiffs did not contact ABC to inquire about the
19 underlying documents and even if they had done so at the time
20 ABC would have certainly been open to discussing the
21 possibility of making them available for inspection and copying
22 at that time even though it would not have been required.

23 So on the issue of timeliness, ABC believes that it
24 has proceeded in accord with the Court's case management
25 scheduling order with respect to discovery of expert reports,

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1 expert witnesses, including underlying documents and that's
2 actually even specified in the case management order and there
3 are methods for allowing inspection and copying of these
4 documents without any prejudice to plaintiffs, a method that we
5 have attempted to discuss with plaintiff but have not had much
6 response in that regard.

7 Having said that, the proposal that ABC would like to
8 make that might lead to a positive resolution from the
9 perspective of everyone is that the issue of liability and
10 damages be bifurcated. And this is also in accord with
11 decisions of Courts in this district and other districts as
12 well with respect to damages in entrenchment cases where
13 plaintiff demands an accounting of defendant's profits. In
14 entrenchment cases it's not uncommon for Courts to leave
15 discovery with respect to damages and an accounting until after
16 the issue of liability is determined for the obvious reason
17 that to do so can avoid unnecessary expense. And in this case,
18 this particular issue is a burden because we have the issue of
19 the cost of production.

20 So by bifurcating we can proceed, all parties can
21 proceed as presently scheduled. ABC is prepared to proceed in
22 accord with the Court's current schedule with respect to
23 motions in limine, jury instructions, pretrial conference, the
24 trial itself and if there is a determination of liability --
25 and also there would need to be a determination of not only

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1 liability but intentional conduct as well, because we don't
2 need to reach the issue of damages for an accounting unless
3 intentional conduct is shown. So all of these issues can be
4 explored at trial and if they're established then the Court can
5 review or establish another schedule for maybe further
6 discovery. If plaintiffs would like to review these underlying
7 documents at that point, they can depose Mr. Loketch. The
8 Court can also decide at that point what it would like to order
9 with respect to the costs, payment of costs for the production.

10 That's all, your Honor.

11 THE COURT: Okay. Is this something that you've
12 raised with your adversary or would this be the first time that
13 Mr. Nadler is hearing, this specific proposal.

14 MS. TERSIGNI: I have not raised it with him. I would
15 like to have felt that I could have, but under the present tone
16 of the litigation I don't think that that would have been
17 productive. I have reached out, did reach out many times on
18 this issue and didn't get a response. And I believe that that
19 would happen again. It's a judgment call. I hope that that
20 doesn't bar review of the proposal at this point.

21 THE COURT: Let me ask this, Mr. Nadler: Obviously
22 you just heard the proposal and I recognize that it is
23 something that you may need to consult with your client about,
24 but let me get your initial reactions to the proposal.

25 MR. NADLER: I would say on the one hand this is

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1 purely -- as far as the damages that these document, the expert
2 goes to damages, bifurcation, I have to take up with the client
3 as well as give it additional thought whether that would solve
4 the problems or a portion of it. But, again, we have no idea
5 what's in these 40,000 pages of documents that don't just go to
6 damages but also go to defendant's liability. These are not --
7 if we were just framing these as documents that were being
8 identified in connection with an expert report, that would be
9 one thing, an expert report on damages. But, again, these
10 documents were requested, specifically requested, all documents
11 related to any deductions or any documents concerning your
12 purchase of the subject goods, all of these were requested and
13 they weren't turned over and now there's this 40,000 pages and
14 at least I find the concern of what haven't we seen. Sure, we
15 could just put it into a nice little package and say it all
16 goes to damages, but without having seen these documents or
17 even known of their existence prior to this time it would seem
18 a bit prejudicial to say, well, we don't really have to worry
19 about turning those documents over if we bifurcate and we
20 package them up as damage documents and go to trial on what
21 we've seen to date.

22 THE COURT: I have I suppose a slight variation on the
23 proposal or a separate proposal that I'd like the parties to
24 consider. What I'd like the parties to do is to think about my
25 proposal and let me know where they stand and if you're not

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1 able to reach agreement I'll just decide on one or the other.
2 I think in connection with the -- well, let me ask this: In
3 connection with the 40,000 pages of documents my thought on it
4 and my proposal was going to be that in advance of any actual
5 deposition of the expert that the plaintiff be permitted to
6 take a short deposition, whether it's termed a 30(b)(6) type
7 deposition or some other deposition, it may require
8 Mr. Loketch, it may require someone else, who would be able to
9 say sort of what those 40,000 documents are, how they were used
10 in connection with creating the income statements and how they
11 were used in connection with creating the expert report. So
12 that would be the proposal that would deal with -- and then
13 after that deposition plaintiffs can make a decision about what
14 documents, what within those 40,000 documents they view as more
15 important than others and can make decisions about reviewing,
16 copying and the like.

17 So that would be the overall proposal. Then what
18 would follow would be the expert deposition. But what I will
19 add, I guess, to address Mr. Nadler's concern with regard to
20 the bifurcation -- so this is my addendum to the bifurcation,
21 we would have a similar 30(b)(6) type deposition with regard to
22 these 40,000 pages of documents so that Mr. Nadler can make a
23 determination concerning whether those documents are documents
24 that, again, relate purely to damages or relate to both damages
25 and liability or relate solely to liability. So it would be

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1 someone who is familiar with those documents who could provide
2 Mr. Nadler with an understanding of what those documents are so
3 that he can decide whether in terms of the fact discovery part
4 of the case, whether those documents are in fact things that he
5 believes some or all of them are relevant with regard to
6 liability. And that would be the proposal that would be sort
7 of the add-on to Ms. Tersigni's proposal concerning
8 bifurcation.

9 So what I'd like the parties to do is to talk about
10 those two alternatives, and again, I have not been privy to any
11 other discussions but any other sort of resolutions, but I
12 think either of those two proposals I think deal with the issue
13 of the 40,000 pages. I know it doesn't deal with the issue of
14 expense and who pays. That I would leave for another day, but
15 it certainly deals with the issue of what relevance those
16 documents might have with regard to liability and what
17 relevance they might have with regard to damages.

18 All right. First let me hear from Mr. Nadler with
19 regard to that. I would like the parties to consider that. I
20 know, obviously, that the Thanksgiving holiday is coming up,
21 but I'd like to get a response to the parties on this because
22 we do have a trial date in February and it's my intention to
23 keep that date. Obviously, if we need to extend we are going
24 to need to extend, if the matter is not bifurcated, extend
25 expert discovery and obviously the 30(b)(6) suggestion I have

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1 with regard to the 40,000 documents would be an add-on to the
2 fact discovery. To the extent that we would need to do that I
3 would permit that.

4 So I would like to hear from the parties on this at
5 some point next week, but let me hear from Mr. Nadler with my
6 gloss on the bifurcation proposal as well as my independent
7 suggestion with regard to moving forward with the schedule,
8 including expert disclosure, but adding this aspect of the
9 deposition concerning the documents in advance. Mr. Nadler?

10 MR. NADLER: Well, respectfully, your Honor, I guess,
11 I'm just trying to square how a failure to turn over documents,
12 had we made a motion to compel or a motion for preclusion, if
13 it was made in limine or whatnot, my understanding of Rule 37,
14 Rule 26, there would have been clear grounds for ordering some
15 sort of remedy to this, in which the defendants would have had
16 to offer substantial justification for not turning the
17 documents over. The idea of taking a 30(b)(6) to ask someone
18 with knowledge what documents you believe are relevant to
19 damages, to liability, I guess asking a lay person what they
20 think is relevant is --

21 THE COURT: That determination would really be a
22 determination the lawyer would make based upon the facts as
23 they get from the witness. In other words, I don't know what's
24 in these boxes of documents, but someone must. So it would
25 really be, I think, Mr. Nadler, sort of your determination

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1 based upon what you know about the case, based upon the
2 relevant documents that have been produced as to whether the
3 documents would be relevant to liability or damages. I
4 wasn't -- and I apologize if I was not clear -- I wasn't
5 suggesting that the person, the deponent, be given that view.
6 The deponent would be someone who could just explain what's in
7 these 40,000 pages of documents and obviously it would be to
8 the extent that the proposal would be to keep the schedule as
9 is, that person would also have to speak to, or that person
10 would have to speak to this also about how they were used to
11 create the income statements and how they were utilized in
12 connection with the expert report.

13 Now, with regard to the Rule 37, no such motion was
14 made before me. These are documents as I hear you say were
15 requested, but not produced, I don't know whether -- was there
16 a representation that they had been produced, in other words,
17 the documents, or was it just that they hadn't been produced
18 and neither side had really referenced them until really this
19 juncture?

20 (Continued next page)

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Conference

1 MR. BARRETT: Well, they were never disclosed nor
2 produced and if I understood Ms. Tersigni's statement earlier
3 she had indicated somehow that there was some sort of burden
4 somehow on plaintiffs to further demand documents that were
5 never identified. For instance -- well, when the income
6 statement was produced Mr. Nadler -- I never asked for the
7 underlying documents. However, those documents, the document
8 requests stated all documents concerning any number of
9 different topics that these documents would have been, fallen
10 under the umbrella of and they were not even identified. They
11 were not disclosed. So plaintiff had no knowledge of these
12 documents until the last two weeks ago when the letters were
13 written.

14 And again, to the extent that no motions have been
15 made yet that was I guess what was underlying my letter to the
16 Court to say perhaps there was a way before making such a
17 motion seeking the Court's guidance on how to resolve it. But
18 I think the issue here is not so much tied to expert versus
19 nonexpert. It was the non disclosure during fact discovery --
20 and this as been, and plaintiffs were held to a certain
21 standard earlier on in this case for doing something or
22 allegedly doing something that was in my opinion was far less
23 egregious than this that was -- disclosed existence of 40,000
24 pages of documents that were specifically requested. And
25 again, there was no objection to it would be burdensome to

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Conference

1 produce them, the costs. And I know you said you'd leave the
2 costs for another day and we could do that so I'm not going to
3 get into, you know I won't waste the Court's time or opposing
4 counsel's time with going into arguments about that. But I do
5 think that at a minimum, defendants should be required to
6 either turnover these documents at their own expense or -- I
7 mean Rule 37 is clear that preclusion is the remedy for
8 documents that are not produced or for failing to supplement
9 disclosures. And then there's a number of factors the Court
10 can look at rather than preclusion as a lesser sanction but
11 that's only upon a showing of substantial justification for not
12 producing the documents I haven't heard any explanation from
13 defense counsel as to why these documents weren't produced when
14 they were specifically requested other than there was no
15 further requests for documents that were never disclosed.

16 THE COURT: Well, let me ask this because again I
17 don't have the actual, as I understand it, I don't have the
18 actual requests in front of me. Mr. Nadler, my suggestions
19 were in fact to deal with this issue to avoid a Rule 37 motion.
20 I don't know whether you're suggesting that you don't believe
21 that my resolution is what you're seeking, in other words that
22 you want to make that motion.

23 But let me hear from Ms. Tersigni concerning the issue
24 about the timeliness with regard to these 40,000 pages of
25 documents and whether they were requested and why they weren't

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Conference

1 either made available either for copying, earlier for copying
2 or review or produced.

3 MS. TERSIGNI: Well, as I indicated previously, your
4 Honor, ABC believes that these documents were timely produced
5 in accordance with the schedule set by the Court which was for
6 expert discovery to the be, as indicated. These documents go
7 directly to damages which is what the expert is being called to
8 testify to. These documents were obviously known to plaintiffs
9 at the time. It's just not credible the notion that the income
10 statements were produced to them but they had no idea that
11 there were underlying documents.

12 And plaintiffs do indeed have a burden, your Honor,
13 with respect to trying to resolve discovery disputes. I don't
14 think there will would be any dispute regarding that. There's
15 no question that if a party believes that not enough discovery
16 has been made they pick up the phone and they call their
17 adversary and they say, hey, what about the underlying
18 documents? I have these income statements but there must be
19 underlying documents, right? That call was never made and
20 that's what I meant when I said the call was never. And that
21 supports the reason that call was not made is because
22 plaintiffs understood that those underlying documents which
23 would have been for me to be voluminous because they usually
24 are and because we have nine scores at issue. They assumed
25 that that would be left for expert discovery because the

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1 parties did not want to engage in the costs of dealing with
2 that discovery prior to a decision on the dispositive motions.

3 So number one, I have not heard either today nor did I
4 hear in my discussion with Mr. Nadler two weeks ago in trying
5 to resolve this although I asked him many, many times why is it
6 do you think that these are not timely in light of the -- and
7 schedule order that we have, indicating expert discovery about
8 the time that we've been discussing? And I don't understand --
9 I don't think I heard a response or if there has been a
10 response to that I don't understand it. I just keep hearing,
11 we requested it and we didn't get it. And the response to that
12 is that we weren't required to produce it at the time. They
13 did get documents anyway. And the underlying documents were
14 obviously known. Had there been an issue it could have been
15 resolved at the time and I don't think there would have been an
16 issue. We would have made them available and it would be the
17 same thing then as it is now. And to just keep insisting that
18 there's some issue with respect to timeliness especially in
19 light of the reference that Mr. Nadler has made to sanctions
20 that were imposed upon him, is there any issue regarding the
21 persistence about timeliness with that comment? The comments
22 made I don't know how that's relevant to this issue. I don't
23 believe that there is an issue regarding timeliness. The Court
24 is offering options to deal with alleged prejudice. ABC has
25 been offering options as requested. All of the options are

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Conference

1 from plaintiffs that they would like -- we have not received
2 any. I've had to very affirmatively repeatedly invite
3 Mr. Nadler to inspect the documents, to schedule a time to come
4 review the documents and he wasn't interested. He wants to
5 keep saying that it was untimely and so on and so forth. And
6 it appeared that there's not an interest in resolving purported
7 prejudice. And with respect to your Honor's suggestion, I
8 think it's important for us to keep in mind the circumstances
9 of this particular case.

10 Now, while I think it makes sense that if there's some
11 question about what's contained in documents that pertains to
12 important issues like liability, yeah, it would make sense to
13 have an examination. But number one in this case I have
14 represented, my firm has represented through pictures and in
15 writing to the Court what's in these documents. There are bank
16 statements, similar records, utilities expenses, invoices and
17 paid bills which are normal documents with respect to documents
18 underlying income statements.

19 Now, the notion that something about liability is
20 hidden in there needs more support to justify what we have in
21 this case. We have estimated damages of less than, assuming
22 that plaintiffs could surmount its burden on -- liability and
23 that there was intentional backdated conduct here. So assume
24 all of that -- and by the way plaintiff has not even deemed
25 it necessary to depose ABC. They never deposed ABC on any

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Conference

1 liability issues or on any intentional conduct issues. They
2 only raised this purported issue now. And if this is the case
3 was two thousand dollars the idea that we're going to have an
4 examination of potentially a representative of ABC or maybe it
5 would be the expert that's more costs. Mr. Nadler will
6 undoubtedly seek to try to go beyond the scope of just
7 inquiring about these documents.

8 THE COURT: Counsel? Counsel? Counsel?

9 MS. TERSIGNI: -- and this is two thousand dollar
10 case. It not -- the burden is not justified. ABC believes
11 that the best way to deal with this issue and also properly
12 address plaintiff's concerns. And the concerns should be for
13 plaintiff's alleged prejudice and how to resolve that. Not
14 plaintiff's complaint that they were sanctioned and so for some
15 reason ABC should be sanctioned. We can leave these issues
16 until after liability is determined. We can then conduct if
17 it's deemed necessary and deemed that my representation of
18 what's in these documents are that there might be some reason
19 to think that there's anything in these records other than
20 invoices and payroll records, we can deal with that after
21 liability is determined and put this case back on track.

22 ABC wants to reach conclusion on this issue. We want
23 to move forward and we want to comply with all the obligations
24 that we have, we believe that he have. And we don't believe
25 that this is a good faith -- here. But in the event that it

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1 is, it can be addressed after determination on liability.

2 THE COURT: OK.

3 MR. NADLER: Your Honor, if I may respond to that?

4 THE COURT: Yes. Is that Mr. Nadler?

5 MR. NADLER: Yes.

6 THE COURT: Yes. Go ahead.

7 MR. NADLER: The first thing is page three of the
8 letter that I submitted on November 5 listed in the footnote
9 some of the document requests that were served which your Honor
10 had indicated that you didn't have any of the specific document
11 requests in front of you, so the Court has that letter in front
12 of it. The issue Ms. Tersigni makes a lot of presumptions and
13 uses word like "obviously" these documents were known or that
14 plaintiffs presumably -- we requested those documents, further
15 requests to be requested after specific and dispositive motion.
16 None of these presumptions or obvious things are actually
17 accurate.

18 Reality is documents were requested. There's an
19 obligation to produce them. If you fail to produce them
20 there's consequences and the rules lay that out very clearly.
21 It's not a matter of saying, well, because sanctions were
22 levied here that they should be levied again. My point in
23 raising this was that when documents aren't timely produced
24 there's certain rules -- if any time there was a voluminous
25 amount of documents one could just bring them under an expert

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1 report and not turn them over during fact discovery. Then you
2 know what is the -- is there in any of the rules in Rule 37 or
3 in 26 for that matter for disclosing the existence of documents
4 and responding to document requests. The reality is that the
5 documents were requested. They weren't produced. They weren't
6 even made known in any disclosures or form.

7 THE COURT: What was the -- I have the requests in
8 your Footnote One but what was in the response, the written
9 responses from ABC, what did they say? In other words, what
10 did they say?

11 MR. NADLER: For instance, number thirteen which was
12 all documents concerning gross profits or sales of ABC products
13 and this is the -- 000259 through 270. So basically, these are
14 income, income statements.

15 THE COURT: OK. All right. And I take it --

16 MR. NADLER: At that point -- so at a minimum at that
17 point plaintiffs ABC had an obligation to, one, disclose
18 Mr. Lopez's identities because he was the person who created
19 the income statements. So under Rule 26 timely supplemented
20 disclosures -- someone that was never done. It was only for
21 because expert discovery happened to be held off until the end
22 and that was what was discussed at the beginning of the case
23 with the case management plan was setup. But it worked out
24 conveniently that Mr. Lopez could then be disclosed -- but
25 putting that aside, the 40,000 pages are definitely responsive

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1 to that request or request number 25. Again, there is the
2 response to that was see ABC 259 through 270.

3 If the document that underlies the income statement is
4 unquestionably responsive to that request. And just because
5 there's 40,000 pages doesn't mean that you can just say, well,
6 we didn't have an obligation to produce them or, obviously,
7 plaintiffs knew about them and they didn't ask for them again.
8 I mean, there's a requirement when you respond to these things
9 that you are identifying and disclosing all the known
10 information and all the relevant information and documents that
11 are in possession, custody and control.

12 As to certain other representations or statements made
13 Ms. Tersigni that this being a two thousand dollar case that is
14 a damages issue, it's not -- plaintiff will disagree with the
15 defendant's calculation of damages but it's not to be decided
16 on today's call or isn't even necessarily relevant. Reality is
17 the documents were requested. They were -- and my
18 understanding again is that plaintiffs have the right to
19 request that the documents be produced in a certain form, that
20 the documents be produced in hard copy as they were. And then
21 if the defendants object to that they can file an objection.
22 And if it's too burdensome to do that we can permit an
23 inspection or come up with some other way of dealing with this.
24 But when documents are requested in a certain form that was the
25 plaintiff's prerogative to request that we produce the hard

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Conference

1 copy and that plaintiff should bear the cost of copying the
2 40,000 pages. And on top of that the expense of these
3 documents shifts to plaintiffs to say, well, the only way that
4 can you really --

5 THE COURT: Mr. Nadler, if you could slow down a
6 little bit. And just from the point where you said we were
7 talking about the burden shouldn't be on the plaintiffs, if you
8 could just repeat that and just slow down. The court reporter
9 is having a little bit of difficulty keeping up with you.

10 MR. NADLER: My apologies. The first point that I was
11 making was that the plaintiffs had requested the documents in
12 their document requests in a certain form, that the documents,
13 copies of the documents be produced to plaintiffs within 30
14 days of the request. Common practice is to produce the
15 documents in the form that they were requested or in hard copy
16 form. No objection was made by the ABC defendants to producing
17 the documents in that form or in any form. They just
18 identified 11 pages of documents and just decided to disregard
19 the other 40,000. Then on top of that, to the extent that
20 these documents were part of an expert report or underlying
21 expert report it would seem unreasonable to say that the only
22 way that plaintiffs could test the merits of that expert report
23 is if they were inclined to bear the burden of copying 40,000
24 pages of documents. To the extent that this would allow
25 anybody who ever served an expert report to just say just based

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1 on hundreds of thousands of pages of documents and you,
2 recipient of that report, had the burden of copying those
3 documents if you want to attest to it. My understanding, and
4 again are documents that experts relied on are usually produced
5 by the expert or by the parties producing the report with the
6 report itself.

7 But again, I don't want to move too far into the
8 expert area at this moment because I still think that the
9 primary issue, the primary underlying issue is why these
10 documents weren't produced during fact discovery. And to
11 simply say, well, they weren't asked for two and three times
12 simply doesn't seem like a justifiable response. It doesn't
13 seem like a reason that the documents were never even
14 disclosed.

15 THE COURT: Well, I'm going to make a ruling with
16 regard to this. With regard to the responses to -- and again,
17 I only have the one that you mentioned, Mr. Nadler. I think
18 that defendants should have provided more information in their
19 responses. However, I also think that the production of -- and
20 I don't know how many pages there are of the income statements
21 on themselves. The income statements are clearly on their face
22 summaries and they had to have been based upon underlying
23 documents. So what I'm saying is that I don't think either
24 side is completely, can absolve themselves of certain
25 responsibilities. I understand the initial burden was on the

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1 defendants but they produced documents which at least on their
2 face that I've seen clearly were summaries. I'm not going to
3 order that they are precluded from utilizing these 40,000 pages
4 of documents. I want the parties to consider my proposal.

5 I heard Ms. Tersigni indicating that it would be a
6 certain amount of costs. But you know what? I in an effort to
7 resolve this issue which could have been avoided but maybe not,
8 quite frankly, because I think because of the nature and the
9 way counsel has approached this case and I'm not describing it
10 to one side or the other, but it appears to me -- and this is
11 not the first time that counsel have had inability to really
12 discuss things and hear what we each other is saying in order
13 to come to sort of resolution or at least to focus the issues
14 for me.

15 So what I'm directing the parties to do is consider
16 the proposal both the Ms. Tersigni's proposal of bifurcation
17 but with the added part that again to address Mr. Nadler's --
18 again, and I don't know, I'm not privy to the parties'
19 discussions with regard to the contents of these documents.

20 Ms. Tersigni, I do recognize that you do indicate in
21 your letter and provide a photograph of some of the boxes in
22 question or maybe they're all the boxes. I don't know. But I
23 would permit again and it would be a short deposition as to
24 what these boxes actually contained. And again, the deposition
25 can be avoided again, if the parties agree to the inspection.

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1 But that my solution is that the deposition either occur to
2 satisfy Mr. Nadler that these are not documents that he
3 believes are relevant to the liability issue. And then the
4 decision is whether or not the parties want to proceed and
5 either bifurcate or whether they want to proceed on both
6 tracks. And if the parties aren't able to reach agreement I
7 will tell you what you are going to do.

8 But since --

9 MR. NADLER: Your Honor?

10 THE COURT: Yes, Mr. Nadler.

11 MR. NADLER: If I might just make one last proposal
12 which is what I had proposed to Ms. Tersigni originally and we
13 would have perhaps avoided this entire thing? When I
14 originally called Ms. Tersigni to, after I requested that she
15 produce, when she was producing all of the underlying documents
16 that the expert relied on and it was at that point that she
17 said, well, we will make that 40,000 pages, that 40,000 pages
18 we'll make them available for inspection, if Ms. Tersigni or he
19 the defendants produced the documents in some form I would
20 think that might be cheaper less expensive than necessarily
21 taking a deposition, asking someone what's in these boxes,
22 that's all we were really asking for. We were willing to
23 perhaps -- not waive anything overlooked that the documents
24 were entitled to, they were produced now and then we had an
25 opportunity to actually review testimony and see what they

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1 contained and perhaps that would raise issues. But we have no
2 idea what's in those documents.

3 And if the Court believes taking a deposition to have
4 somebody answer to what's in those books then that is perhaps
5 the best way, we will follow the Court's lead on that. But to
6 the extent that there's these other issues, the intent was not
7 to put this on two tracks or to have bifurcation or to have
8 multiple depositions. Really it came out of no where that
9 these documents even existed.

10 THE COURT: Well, I mean --

11 MS. TERSIGNI: Your Honor?

12 THE COURT: Just one moment, please, Ms. Tersigni.

13 MS. TERSIGNI: Yes. I am sorry.

14 THE COURT: That's OK. Mr. Nadler, while I agree with
15 you that the affirmative disclosure of the documents was
16 something that had not occurred, I don't agree with you that
17 had someone looked at the income statements that you could view
18 it as anything other unless and, again, I don't know what other
19 documents have been produced but that someone could review the
20 income statements as anything other than a summary that has to
21 be based upon some underlying documents.

22 Now, all I'm doing is just pointing out that while I
23 agree with you the actual disclosure, oh, by the way there are
24 40,000 documents did not occur until later. I have no idea
25 what's more expensive or not. I've told the parties what I

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1 would like to have happen. If it's less expensive to produce
2 the documents, fine.

3 MS. TERSIGNI: It's not.

4 THE COURT: All right. Mr. Nadler, I guess is it your
5 request that -- because it's not going to be both. So, you're
6 either going to get the documents produced to you. You're not
7 going to have a deposition to find out sort of what they are
8 and what they consist of and you are not going to be able to
9 find out how they were utilized in connection with the income
10 statement. You'll just get the documents and you'll be on your
11 own to figure that out. And when it comes time for the expert
12 deposition you can ask your questions within the bounds of the
13 length of the expert deposition.

14 So I guess what I'm saying is I'm leaving it up to the
15 parties. I'm not going to -- If, Mr. Nadler, what you're
16 saying is you don't want to have the deposition and that
17 because whether it's expensive because of a choice, then that's
18 a fine. But I don't know what the cost of producing the
19 documents are because I imagine all of them are not necessarily
20 uniform.

21 MS. TERSIGNI: Can I provide some invite on that?

22 THE COURT: Sure.

23 MS. TERSIGNI: We have approximately 40,000 pages.
24 And our copying service will copy documents at a base of
25 fifteen cents per page but that can vary. But assuming it's

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1 the base now, that's six thousand dollars for what we believe
2 is a two thousand dollars case.

3 Also, why can't plaintiff come and inspect the
4 documents to see what's in them? They are well organized and
5 labeled. I sent you the pictures. So when they open up the
6 box of invoices it's going to be lots of invoices. I'm having
7 trouble imagining what regarding liability would be in there.
8 There are no issues remaining to be in dispute regarding the
9 amount, the number of units sold and what they were sold for.
10 But I can't imagine what would be in there. But they can, I
11 would think -- I haven't done it myself -- but I would think if
12 this were my tax, I would go have a look at -- it's eight
13 boxes. It's not a warehouse. They're very labeled and I would
14 at the very least try to see if I can make sense of it
15 relatively quickly. Presumably, plaintiffs will have to do
16 some kind of review at some point even if 40,000 pages are
17 reproduced, they will have to look through them. Why not go.
18 Maybe they only need one or two boxes. Maybe they just want
19 certain documents. They don't need the invoices. The invoices
20 show all of the sales which is not -- and then we deduct from
21 that to get our net profit. But I don't understand what the
22 issue is. But to the extent that they believe that there might
23 be some question as to what's in these documents, I believe
24 they could perform a reasonable review of these documents in
25 the matter of hours. If counsel just simply looks at it and

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1 determines, do I really need these? And if he makes that
2 determination we can go from there. But here, we're shooting
3 in the dark saying that we are going to have a deposition and
4 we're going to decide which documents go to liability he's
5 going to question about 40,000 documents. And the response he
6 will likely get is, these are the categories of documents.
7 These are the documents we use to prepare our income
8 statements.

9 And I don't know where counsel goes from there. I'm
10 not saying we have to determine that now but I'm trying to
11 balance the circumstances of this particular case with the
12 purported issues and the possible expense that can be involved
13 based on these purported issues. And we can address this in a
14 more narrow way if plaintiffs would at least attempt to see
15 what it is that they might want to look at. Go look at it and
16 let's go from there. This is what I was focusing on during the
17 discovery conference. Let's get down to what it is you need
18 and what it is you feel you need to prepare for trial.

19 And on that note we were trying to say, do you need
20 more time? What's the issue? What would you like? And he
21 would not give me any time frame that he wanted. So I offered
22 a timeframe and he didn't say that wouldn't work and so on and
23 so forth. So a lot of this is questionable. The motives here
24 are questionable. But putting aside because there is
25 speculation, I don't know. I think we really need to keep an

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1 eye on the expense and the burden versus the circumstances of
2 this particular case. There should not be undue and oppressive
3 expense and burden because this supposed issue has been raised
4 and I think we need to consider where this issue is coming from
5 and whether it's a real issue and can be resolved with less
6 expense.

7 THE COURT: Mr. Nadler --

8 MR. NADLER: The time for raising that objection was
9 in the document response and it wasn't me.

10 THE COURT: Mr. Nadler, let me ask this though. You
11 say you want all of the documents. Why not spend half an hour,
12 40 minutes looking at them to determine whether you want them
13 all? If what you are saying to me is that you want them all so
14 you can review them, then I'll hear you on that. But I'm just
15 trying to figure out what the alternative is that you're
16 actually seeking.

17 MR. NADLER: I'm not sure I understand. I could look
18 at 40,000 pages of documents and say that these are all
19 document that were relied upon in making the income statement.
20 One of the issues is that the connection with the income
21 statement or any of the categories has to the subject to the
22 accused -- in this case, there has to be a nexus between them.
23 In order for me to even assess whether there's a connection
24 between I'd have to look at each of the documents and see,
25 don't they reference the accused apparel or not? And that

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1 presumably would require looking at each of the documents
2 unless the defendants are to be deposed on -- I thought that
3 was actually going to have to go into the expert witness
4 deposition and explain to me how this category whatever it is
5 in that income statement is connected to the accused apparel
6 and then show me where in the documents is that connection
7 made. To go and look at 40,000 pages of documents and say,
8 okay, OK we have a box of invoices, we have box of paystubs, we
9 have a box -- I can do that but I could also, I don't know
10 where that will leave us because if --

11 THE COURT: Well, at a minimum it would leave us as I
12 understood you earlier to say is that you didn't know one way
13 or the other whether the documents that are part of these
14 40,000 were related to liability or damages. It would allow
15 you to assess whether or not there are any in there that you
16 believe relate to liability. At least I think it would be. In
17 other words, that you wouldn't necessarily have to rely on as I
18 understand it the representation counsel has made as to what
19 the documents are. You could actually see them for yourself.
20 My question is, with regard to reviewing them I take it you are
21 saying you don't think it would be a useful exercise to do
22 that.

23 MR. NADLER: In the 30 to 40 minutes I could get an
24 understanding of what the roots of the documents are but it's
25 40,000 pages. it's a monumental amount of documents for review

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1 and if there's something in those documents that -- again, when
2 I say that I don't know whether one way or the other whether
3 they go to liability or damages it's not meant to say that -- I
4 have no idea what's in those documents, not just the categories
5 but what any individual document could show.

6 THE COURT: OK. So I guess my question is I had made
7 various suggestions. Ms. Tersigni had made suggestions but it
8 sounds like, Mr. Nadler, you just want to get all the
9 documents.

10 MR. NADLER: Your Honor, out of respect for you and
11 for -- I will take the proposal that in consideration and think
12 about it further and see if we can work -- you know because --

13 THE COURT: Why don't you do that. Why don't you do
14 that. And what I'd like to do is hear back from the parties in
15 a week from today which is -- so on December 1st to hear
16 whether or not there's been some sort of resolution. And if
17 not, I'll just issue an order directing what the parties should
18 do.

19 MR. NADLER: Your Honor, just one other question. We
20 have motions in limine and pretrial memorandum currently due on
21 December 7th, I believe.

22 THE COURT: Once I make a decision if I need to make a
23 decision on December 1st. Well, I will reset the schedule for
24 that. To the extent, again, I don't know what these -- so,
25 it's motions in limine due on the 7th.

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1 And I guess, Mr. Nadler, you are saying you don't know
2 whether these documents go toward, impact that. But I'll hold
3 that date

4 MR. NADLER: -- we were to make a motion in limine for
5 some sort of --

6 THE COURT: I'll hold that date in abeyance and I'm
7 going to move that date. I don't know what that date will
8 become. But I'm not saying that the parties, if they have
9 certain motions in limine that don't relate to these issues or
10 these documents they, obviously, can work on them but December
11 7, that date will be moved depending upon whether the parties
12 are able to agree and I'll reset the schedule next week once I
13 get the parties', the information from the parties, in other
14 words, whether there is an agreement or not.

15 MS. TERSIGNI: Your Honor, can I just clarify what the
16 game plan is? So the parties are to wait for Mr. Nadler to
17 consider the proposal of the Court and ABC and then the parties
18 are if there's any movement to be made in this regard
19 Mr. Nadler will contact us?

20 THE COURT: Well, I think the parties should actually
21 once Mr. Nadler sort of reviews the proposal -- and again, they
22 should then meet and confer. And if Mr. Nadler says, no, I
23 want -- I've looked at all the proposals. None of them work
24 for me. I've discussed bifurcation with my client and that
25 doesn't work either, you know what I would like to have happen

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1 is have these documents produced or whatever the outcome is.
2 But once he's had an opportunity to think about it, consult
3 with his client, the parties should then meet and confer and
4 come to -- Well, if there isn't an ability to come to an
5 agreement, just let me know, we have been unable to reach an
6 agreement and I'll issue an order directing you to do --
7 directing what the parties should to.

8 If you're able to speak with one another and reach an
9 agreement -- and it's not limited to what we've discussed here
10 today. Obviously, if somebody comes up with another idea that
11 they think would work and be efficient for the parties, you are
12 absolutely welcome to do that. The only reason why I'm sort of
13 put out the different scenarios is that at least in the past
14 left to your own devices you haven't been able to really do
15 that effectively but if you are able to do that, that's fine
16 also. But what I'm saying is after Mr. Nadler, cause I
17 understand this is the first time he heard about the
18 bifurcation and the first time he had heard about my
19 suggestion. And after he has time to think about it he should
20 contact Ms. Tersigni and have a conversation. It may be a
21 short conversation and then the parties should write a joint
22 letter saying whether they were able to reach a resolution or
23 not, or if there is anything of more specificity the parties
24 believe that would be useful, in other words, concerning a
25 particular proposal but there may be one issue that the parties

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1 have been unable to resolve.

2 And if you are unable to reach a conclusion I will
3 issue an order directing the parties what the parties should do
4 as well as resetting the schedule. But I would reset the
5 schedule again if it's not going to be bifurcated, I'll reset
6 schedule in such a way no matter what that we're going to keep
7 that February trial date. All right?

8 MR. NADLER: Your Honor, we have until December 2nd --
9 that's a Wednesday -- just because of Thanksgiving holiday we
10 are going to lose a couple days and I would just ask for one
11 additional day to report to the Court with the --

12 THE COURT: That's fine. December 2nd is fine.

13 MR. NADLER: Okay. Thank you.

14 THE COURT: Look, I understand it is the holidays. So
15 if it comes down to it and for whatever reason you need one
16 extra day, that's fine. But right now I'm expecting to hear
17 from the parties on December 2nd.

18 MS. TERSIGNI: Thank you, your Honor.

19 MR. NADLER: Thank you.

20 THE COURT: Thank you. Look forward to getting your
21 letter. Take care, everyone. Have a good Thanksgiving.

22 (Adjourned)